

OUTGOING TELEGRAM

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Department of State

CONFIDENTIAL SECURITY INFORMATION
Classification

140

SENT TO: Amembassy, TOKYO. 1045
FCN Treaty. EMBTEL 1249.

Origin

Info:

1. JAP counterproposal redundant and pointless.
~~DEPT~~ DEPT prefers deletion ART I material ~~EXERC~~ altogether.
2. Limited definition WLD impair broad purposes investor visa clause and not (rpt not) acceptable.
3. AMER businessmen have criticized wording JAPS propose ART V-bis. DEPT reluctant accept unless development JAP position RE treatment AMER investment generally shows good reason.

Fuller discussion follows ~~AGAM~~ ~~EXERC~~.

BRUCE

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*Bruce
Acting
Ambassador
(U.S.S.)*

Drafted by:

EDT:CP:HWalker:mrl

Clearances

Telegraphic transmission and

classification approved by:

V. Vernon G. Setser

OFD

NA

L/E

L/EUR

(Pt. 2 Cld. substance Mr. Knight)

S/S-CR

OCT 23 1952 P.M.

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OUTGOING AIRGRAM

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11/19/81

DEPARTMENT OF STATE DIVISION OF COMMUNICATIONS AND RECORDS TELEGRAPH BRANCH

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Embassy,

TOKYO. A-315 October 28, 1952

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DEPARTMENT OF STATE
OCT 31 1952
OFFICE OF THE LEGAL ATTACHE

2787

Subject: FCN Treaty. Embassy's telegram 1249 of October 16.

This supplements Department's telegram in reply to that in reference.

1. The Japanese proposal to state the substance of Article I and transpose it to Article XXIV is objectionable in that it appears either (a) needlessly to export each Party to live up honorably to its treaty obligations, or (b) to suggest that some rule of construction other than the established canons of legal interpretation is to be applied. As to (a), the necessary presumption of fair dealing which underlies treaties of this sort should, in the Department's view, most fittingly remain implicit and not be spelled out boldly. As to (b), the Department would not wish the treaty to contain a rule of interpretation suggesting that the treaty partakes of the nature of a declaration of loose and indeterminate "general principles". Rather, the treaty should clearly remain a body of firm legal commitments. (The Department's experience, incidentally, has been that the National Foreign Trade Council is apt caustically to criticize undertakings based on such vague concepts as "equity" rather than on objective legal standards).

In some particulars, of course, it is impossible or infeasible to formulate or obtain a firmer treaty rule than "equity" or the like; but for most subjects covered by the treaty it is possible and practicable to have more determinative standards (e.g., "national" or "m-f-n" treatment). No purpose would be served by dulling such standards with a general operative commitment on interpretation such as that proposed by the Japanese.

In proposing Article I, the Department it is true had inter alia the purpose of indicating that the provisions of the treaty are to be carried out in a liberal spirit. To realize this purpose properly, however, the manner of wording the clause and its placement seem to the Department to be of controlling importance. The Department's proposal was carried as preambulatory or prefatory material, and worded in a suggestive rather than a categorical manner. In contrast, the Japanese counterproposal is framed as an explicit operative rule and

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placed deep within the body of the treaty. In addition, however, the Department had also a more important second purpose: namely, to stipulate a general rule of equitable treatment for guidance in situations not otherwise covered adequately in the body of the treaty. The Department's proposal was so worded as to constitute an independent rule over and above the remainder of the treaty. In contrast, the Japanese proposal being cast as a condition modifying the rest of the treaty, loses the second purpose altogether. The provision is hardly worth bothering with unless it realizes this second objective.

As previously stated, the Department's solution of the difficulty the Japanese apparently have with Article I, in form and substance, is to delete it in toto. So to abandon the provision would not materially damage the treaty as a whole.

2. The new clause proposed by the Department concerning entry privileges for "treaty investors", is not intended to be limited to investments identified with bilateral trade, but is rather designed to cover substantial and legitimate investments of generally all sorts. The Department wishes it to retain this intent and effect. Otherwise it might add but little to the clause revising for treaty trader visas, and it would rail of its purpose of substantially liberalizing the treaty and strengthening it as a medium for the promotion of private investment. Economically and practically speaking, the international investment process as normally does in fact increase commercial relations between the two countries and indirectly, at least, contribute to their mutual international trade; but there would be no advantage in providing that, as a condition to the issuance of a treaty investor visa, the investments must have a visible and major relation to bilateral trade.

3. The principal change which the Japanese wish to introduce into Article V-bis is the clause "Neither party shall without appropriate reason deny opportunities and facilities for the investment of capital by nationals and companies of the other party". If Article VII and VIII are agreed to in a satisfactory form, this extra wording suggested by the Japanese would add nothing to the treaty, for Article VII and VIII spell out adequately the desired body of commitments concerning the making, development and management of investment enterprises.

Surplus

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Surplus mortgage such as that stated by the Japanese was, indeed, in the treaty with Uruguay (1949) and Ireland (1950); but the Department has on reconsideration decided against putting it in succeeding treaties. The reasons for this decision were: (1) the clause is at best redundant, and thus needlessly clutters the treaty with useless words; (2) it could be construed (but fortuitously) as allowing each party latitude with respect to discharging its full obligations under Articles VII and VIII to accord national treatment in the introduction of investment capital and the initiation and development of investment enterprises; and (3) it has been criticized by the National Foreign Trade Council, which has refused to see in it an affinity with the investment provisions of the ill-fated ITO Charter to which they took strong exception. Thus, quite apart from the consideration that the clause in question is of doubtful merit, there is a good public relations reason for omitting it from the Japanese Treaty.

There appears to be only one presently foreseeable situation in which the Department might possibly wish to consider adopting the amended clause proposed by the Japanese. This would be a situation in which the Japanese pressed strongly for a serious "screening" reservation to their commitments in Articles VII and VIII, and it transpired that they would be prepared to drop their demands for such a reservation in return for our agreeing to the extra clause in Article V-bis. This situation is, of course, as yet purely hypothetical; and it may be emphasized that this contingent Departmental position is merely a possibility rather than a certainty, being mentioned at this time for the purpose of keeping the Embassy informed fully as to the Department's thinking.

The Department, for its part, requests a small technical revision in the wording of Article V-bis as it now stands. To wit, change the phrase "or in the capital, skills, arts or technology which they have supplied", at about the middle of a paragraph, so to read "(concern) in their capital, or in the skills, arts, or technology which they have supplied." This change, which does not alter intent, is desired in order to clarify that the protection extends to capital accretions and reinvestments, as well as to the initial investment; and it is requested in accordance with the views expressed by the NITC.

7:17:10 Walker:mfl
10/23/52

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